Supreme Court of the United States

OCTOBER TERM, 1940.

No. _____

SCHOOL BOARD OF THE CITY OF NORFOLK AND C. W. MASON, SUPERINTENDENT OF SCHOOLS OF NORFOLK,

Petitioners,

vs.

MELVIN O. ALSTON AND THE NORFOLK TEACHERS' ASSOCIATION,

Respondents.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In our petition we have briefly stated the legal questions involved. We will now consider these questions more fully and in the order named:

I.

No Constitutional Rights Violated.

A. School Teachers in Virginia are Employees of School Board.

Sec. 130 of Article IX of the Virginia Constitution, relating to education and public instruction, provides:

> "The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members."

Sec. 133 of the same Article of the Virginia Constitution provides:

> "The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law."

In furtherance of the above provisions, Sec. 611 of the Virginia Code provides:

> "An efficient system of public schools of a minimum school term of one hundred and sixty school days, shall be established and maintained in all of the cities and counties of the State. The public school system shall be administered by the following authorities, to-wit: A State Board of Education, a superintendent of public instruction, division superintendent of schools and county and city School Boards."

Sec. 140 of Article IX of the Virginia Constitution provides:

> "White and colored children shall not be taught in the same school."

Sec. 680 of the Virginia Code provides:

> "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

Neither of the above provides that the teachers in the schools for white children shall be white and those in the schools for colored children shall be colored.

There is no provision in either the Virginia Constitution or the Virginia Code prescribing what salaries teachers in the public schools shall receive. This is left to the discretion of the School Board.

The School Board has a very wide discretion in the management of the public schools.

Sec. 786 of the Virginia Code, relating to the powers and duties of the School Board, provides, in so far as is material to this case, as follows:

> "The city school board of every city shall establish and maintain therein a general system of public free schools in accordance with the requirements of the Constitution and the general educational policy of the Commonwealth for the accomplishment of which purpose it shall have the following powers and duties.
>
> ". . . . . .

> "Third. To employ teachers from a list or lists of eligibles to be furnished by the division superintendent and to dismiss them when delinquent, inefficient or in anywise unworthy of the position. . . .
>
> ". . . . . .
>
> "Twelfth. To manage and control the school funds of the city, to provide for the pay of teachers and of the clerk of the board for the cost of providing school houses . . .".

Sec. 664 of the Virginia Code relating to contracts with teachers provides, in so far as is material to this case, as follows:

> "Written contracts shall be made by the School Board with all public school teachers, before they enter upon their duties, in a form to be prescribed by the superintendent of public instruction. Such contracts shall be signed in duplicate, each party holding a copy thereof. . . ."

The State of Virginia has no tenure of office act covering teachers. They are expressly excluded from the civil service classification of city employees by Sec. 114 of the Norfolk Charter, which provides:

> "Officers who are elected by the people . . . the teachers in the public schools and all other persons employed by the school board . . . shall not be included in such classified service . . .". (Acts of Assembly of Virginia, 1918, pp. 31, 85.)

The teachers in the public schools have no vested rights in the positions they hold. Each year they are

selected by the School Board in May or June to teach for the school term beginning in September following. Their term of service is not fixed by any law but by the provisions of the contract required by law. They have no special right or privilege to teach in the public schools of the city. These contracts are entered into between the School Board and the teacher each year, regardless of whether the teacher has taught in the public schools for prior years or is a beginner. The contract specifies the time for which employed, the rate of compensation, their duties, that they may be changed from one teaching position to another, and other phases of their employment. Under the Virginia law the School Board could, at the term beginning next September, contract with an entire new corps of teachers for all of the public schools of the City of Norfolk and none of the present teachers would have any legal redress in the matter.

The respondent Alston, by entering into such a contract, in writing, voluntarily executed by him and the School Board under date of June 12, 1939, agreed to teach in the public schools of the City of Norfolk for ten (10) school months beginning September 7, 1939, for $92.10 per school month. At the time of the execution of these contracts respondents knew, or with reasonable diligence could have ascertained, the exact salary paid any other teacher in the public schools for the same term. The members of the Norfolk Teachers' Association were all similarly situated.

From the foregoing provisions of Virginia law it is clear that public school teachers are not officers of the State or political subdivisions wherein they teach but are employees of the School Board.

In the case of *Heath* v. *Johnson*, (W. Va. 1892), 15 S. E. 980, which involved a mandamus by a publishing company against a teacher in the public schools to require the teacher to use a certain text book, the same was refused, and the Court, at p. 982 of the opinion, said:

> "What we do decide is that a teacher in this State is not a public officer but is an employee . . ."

To the same effect is the decision in the case of *State* v. *Martin*, (W. Va.), 163 S. E. 850.

In *75 A. L. R.*, p. 1352, under the Annotation "Status of teacher as an officer or employee," the following appears, with a long citation of cases to support it:

> "The Courts are almost unanimous in holding that the position of teacher is that of an employee, resting on the contract of employment, and not that of public officer."

In *Ruling Case Law*, Vol. 24, p. 613, under the subject of "Schools," the following appears:

> "Under the general powers usually reposed in local school boards is included the power to enter into contracts with teachers and fix their compensation and term of employment.
>
> "The discretion of a school board in this respect is very broad, and the Courts will not interfere to aid one whom the board does not choose to employ.

> "The board has the absolute right to decline to employ any applicant for any reason whatever or for no reason at all.
>
> "It is no infringement on the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, of fair complexion or dark, is or is not a member of a trade union, or whether no reason is given for such refusal."

In *56 C. J.*, p. 422, under "Schools and School Districts," the following appears:

> "The amount or rate of compensation which a teacher is entitled to receive for his services depends upon the terms of the contract under which he is employed."

and at p. 382:

> "A teacher, who has been appointed to the position and accepted it, from the time of his acceptance stands in a contract relation as distinguished from the tenure or holding of a public officer. He holds his position by contract and not at the will of the sovereign power."

and at p. 387:

> "Except in so far as they be restricted or limited by statute, or by a rule or regulation of the school board, a school board of officers authorized to contract with teachers have the power to fix the salaries to be paid them, free from interference by other municipal authorities."

In the case of *Mootz* v. *Belyea, et als.*, (N. D.), 236 N. W. 358, a written contract between the teacher and the School Board had been executed. Thereafter the School Board refused to let the teacher teach and employed another in her place. The teacher brought a mandamus against the School Board to require it to install her as a teacher in the public schools, claiming that she had been denied the use and enjoyment of a right or office. The Court denied the mandamus, stating that her remedy in the case was for the recovery of her salary under the contract and as to that she had an adequate remedy at law, and in the course of its opinion, stated:

> "It is the claim of the appellant that she is being denied the 'use and enjoyment of a right or office' to which she is entitled. Whether her contract gives her a right or office depends upon her relationship to the school board and her right under her contract. The duty of employing teachers is vested in the school board, and this is done by contract. The relationship is purely contractual in this State. There is no fixed tenure of office when a teacher is employed other than the pension set forth in the contract. In this State the profession is not under civil service rules. When a teacher is employed by a school district she is not employed as an officer and she does not become an officer. Her rights are measured by the terms of her contract."

In the case of *Seattle High School, etc.* v. *Sharpless, etc.*, (Wash.), 293 Pac. 994, 72 A. L. R. 1215, which involved the employment of a teacher, and from which it appears that the statutes relating to

such are similar to those in Virginia, the Court, in defining the relationship between the School Board and the teacher, said:

> "The employment of teachers is a matter of treaty or voluntary contract. Both parties must consent and be mutually satisfied and agreed. On the part of each it is a matter of choice and discretion. However, though qualified, no teacher has the legal right to teach in the schools until the directors willingly enter into a contract for that purpose. Unless limited by statute in some way, the board is entitled to the right of freedom of contract as much as the teachers are."

In the Opinion of the Judge of the District Court, the following appears:

> "Whatever may be the law in other States, there is no doubt that in Virginia a person can not under the law as it now exists and has existed for many years, acquire a status as a teacher, which gives him certain rights that must be respected, independently of a contract with the board as a teacher. In Virginia the relation is not a continuing one, but can be created only by a contract with the school board in a particular jurisdiction. It continues for only one school year at a time, with the absolute right on the part of the school board not to contract again with the particular person. The board may decline to contract again with such person without rhyme or reason for such refusal and in that particular part of the board's procedure there manifestly has been no discrimination on account of race or color, for the simple reason that the board

> can, after the expiration of the school year, decline to have any further contractual relations with an applicant to teach, whether such applicant be white or colored." (R. 27.)

B. Equal Protection Clause of Fourteenth Amendment not Applicable.

The Virginia Constitution and Code as set out above provide that an efficient system of public free schools shall be established and maintained throughout the State.

The object of this is to afford educational advantages to the children of the State, *not to afford opportunities for persons to follow their vocation as teachers.*

The gist of the equal protection clause of the Fourteenth Amendment is *to extend to all citizens substantially equal treatment in facilities* provided from public funds.

The school facilities provided from public funds are the right to attend school, not the right to teach in a public school. While it may be incumbent on the School Board to maintain schools for the education of children, it is not incumbent on them to maintain a place for one to follow his vocation as a teacher.

In *American Jurisprudence*, Vol. 11, at page 1171, under "Constitutional Law," the following appears:

> "In those cases which have considered employment contracts from the standpoint of the employer, the Courts have held that it is clear that the right of an employer to employ labor is necessarily included in the constitutional guaranty of the right to property. The

> employer may, generally speaking, enter into labor contracts with such individuals as he chooses. Thus, the refusal of the board of directors of a school district empowered to employ teachers to engage a certain person, for any reason or no reason at all, is in no sense a denial of the constitutional right, guaranteed by the due process of law provision, of that person to follow his chosen profession."

In the case of *Seattle High School, etc.* v. *Sharpless, etc.*, Supra, the school directors adopted a resolution:

> "That no person be employed hereafter, or continued in the employ of the District as a teacher while a member of the American Federation of Teachers, or any local thereof . . ."

The plaintiff claimed the resolution was unconstitutional. The Court held the same valid.

The laws of the State of Washington governing the operation of public schools were similar to those of Virginia in this respect and authorize the school directors:

> "First: To employ for not more than one year, and for sufficient cause to discharge teachers, and to fix, alter, allow and order paid their salaries and compensation . . ."

The Court, in its opinion sustaining the resolution of the board, said with reference to the status of teachers:

> "The employment of teachers is a matter of treaty or voluntary contract. Both parties

must consent and be mutually satisfied and agreed. On the part of each it is a matter of choice and discretion. However, though qualified, no teacher has the legal right to teach in the schools until the directors willingly enter into a contract for that purpose. Similarly the directors have no legal right to the services of any teacher until the teacher voluntarily enters into a contract for that purpose. Unless limited by statute in some way the board is entitled to the right of freedom of contract, as much so as the teachers are."

It was also claimed by the plaintiff that the resolution violated the Constitution of Washington State and the Fourteenth Amendment to the Constitution of the United States. As to this the Court said:

> "Quoting Article 1, Sec. 3, of the State Constitution, viz., 'No person shall be deprived of life, liberty, or property without due process of law,' and also the Fourteenth Amendment to the Constitution of the United States on the same subject, it is argued on behalf of appellants that thereunder the right of a teacher to follow his chose profession is too elementary to require any discussion. Granted, but there is no question of that kind in this case. The right of freedom of contract as it exists in this case to refuse for any reason or no reason at all to engage the professional services of any person is in no sense a denial of the constitutional right of that person to follow his chosen profession. . . . Nor can the Courts be successfully invited into a consideration of the policy of the resolution, for that would lead to supervisory control of judgment and dis-

> cretion in the selection and employment of teachers which the statute has given exclusively to the board of directors."

In the case of *People ex rel Fursman* v. *Chicago*, (1916), 116 N. E. 158, the issue was whether the Board of Education had the right in the selection of teachers to discriminate between those who were members of a federation or union and those who were not members of any such federation or union, and whether its action in such regard violated any constitutional or statutory provision.

The Court held the Board of Education had such right and that no such constitutional provision was violated.

From the opinion it appears that the Illinois school laws were similar to those of Virginia. At page 160 the Court said:

> "By the statute the Board of Education in cities having a population of 100,000 or more is given complete control of the schools of the city. Among its powers is that of employing teachers and fixing the amount of their compensation . . . The Board has no power to make contracts for the employment of teachers to extend beyond the ensuing school year, . . . A new contract must be made each year with such teachers as it desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The Board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. The Board is responsible for its action only to the people of the city, from whom, through

the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the Board to decline to employ him as a teacher, in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The Board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction upon this right of the Board to contract, and no one has any grievance which the Courts will recognize simply because the Board of Education refuses to contract with him or her. Questions of policy are solely for determination of the Board, and when they have once been determined by it the Courts will not inquire into their propriety."

In the case of *State ex rel Gumm, et als.* v. *Albritton, et als.*, (Okla. 1923), 224 Pac. 511, it appears that the county superintendent discharged the negro members of the School Board of the School District in which a majority of the population was of the colored race, and appointed white persons on the Board.

The action was brought to oust the white members of the Board and have colored members adjudged the lawful members of said School Board. This the Court refused to do.

At p. 512 of the opinion, the Court said:

"It is contended by plaintiff in error that the said action of the county superintendent in

> the instant case violates the Fourteenth Amendment to the Constitution of the United States, in that such action of said county superintendent, in discharging the colored members and appointing defendants in error, was a denial of the equal protection of the law to the colored children. However, no authorities are cited thereunto. It does not appear, nor did plaintiff in error offer to show, that by the action of said county superintendent in designating the colored school as the separate school, or by the change of the personnel of the said board, the facilities or accommodations for the colored children of such district were not rendered impartial, as compared with those of the white children."

and at p. 513:

> "However arbitrary the action of such superintendent may seem, it cannot be said that the equal protection clause of said Fourteenth Amendment is violated, because it is now shown that accommodations of facilities equal, though not identical, with those of white children, are afforded to the colored children."

II.

Respondents By Entering Into Contracts With School Board of City of Norfolk and Accepting Employment Thereunder, Waived Such Constitutional Rights, If Any They Have, That They Seek to Enforce.

The respondents' rights, if they have any, are personal to them as individuals. It is as individuals that they are entitled to the equal protection of the laws. (*Mo.* v. *Canada*, 305 U. S. 337, 83 L. Ed. 208.)

The respondents, as stated above, have voluntarily contracted in writing with the School Board to teach for the current school term for a stipulated salary. This contract antedates the filing of these proceedings by them. There is no complaint that the School Board has breached any part of its contract.

While we do not consider, for reasons set forth above, that any constitutional rights of the respondents have been denied, yet, in any event, they have waived the same, and are accordingly estopped to prosecute this cause.

In *12 C. J.*, at p. 769, under the heading "Constitutional Law," the following appears:

> "A person may by his acts, or omission to act, waive a right which he might otherwise have under the provisions of the Constitution."

and at p. 770:

> "The waiver of a Constitutional provision precludes the party waiving it from afterwards claiming protection under it, even though it was adopted solely for his benefit, and such a waiver is binding as to both past and future transactions."

and at p. 774:

> "But those Constitutional guaranties, which are in the nature of personal privileges of the accused, may be waived by him and therefore he may not question the Constitutionality of the statute under which he has made such a waiver."

In *11 American Jurisprudence*, at p. 1170, under "Constitutional Law," appears the following:

> "It has repeatedly been held that the right of a laborer to enter into contracts for his services is property within the meaning of the Constitutional guaranties."

In *Cooley on Constitutional Limitations*, Vol. 1, p. 368, the author says:

> "Where a Constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will."

and at p. 369:

> "On this ground it has been held that an act appropriating the private property of one person for the private purpose of another, on compensation made, was valid if he whose property was taken assented thereto and that he did assent and waive the Constitutional privilege, after he received the compensation awarded or brought an action to recover it."

and again at p. 368:

> "There are cases where a law in its application to a particular case must be sustained because the party who makes the objection has by his prior action precluded himself from being heard against it."

The case of *Washington* v. *State of Florida*, 116 Southern 470, in which a writ of certiorari was denied by the Supreme Court of the United States, 278 U. S.

599, 73 L. Ed. 528, involved the exclusion of negroes from juries. Herein the accused claimed he had been denied equal protection of the laws guaranteed him by the Fourteenth Amendment to the Federal Constitution.

The Florida Supreme Court in this case held:

> "While an unlawful discrimination against negroes because of their race or color practiced by an officer in summoning jurors may render the act of summoning illegal, the panel of jurors may not be illegal."
>
> "Where a jury that is competent under the law and that is impartial as is required by the Constitution has been tendered it may be accepted by the accused who thereafter waives his right to object to the panel on the ground that in summoning the jurors members of his race were discriminated against, there being no duress or other improper influence to embarrass or injure the accused."

In the case of *United States* v. *Gale*, 109 U. S. 65, 27 L. Ed. 857, which was a criminal case wherein there was an irregularity in selecting the grand jury which found the indictment, the accused plead not guilty and went to trial without making any objection as to the grand jury selection, and after conviction raised the Constitutionality of the same. The Court said:

> "The second question, as to the Constitutionality of the 820th Section of the revised statutes . . . is not an essential one in this case inasmuch as by pleading not guilty to the indictment and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived."

In the case of *Bon Ton Cleaners and Dyers, Inc.* v. *Cleaning, Dyeing and Pressing Board*, February, 1937, Florida, 176 Southern 55, certain parties who signed a specific agreement with all other parties in a certain area to observe price-fixing regulations of said Cleaning, Dyeing and Pressing Board in the County, prior to the time order prescribing regulations was entered, were held precluded from questioning the constitutionality of the statute authorizing price-fixing for such business.

In the case of *White* v. *State of Oklahoma*, 214 Pac. 202, which was a criminal case, the jury was sworn and the County attorney then asked leave to amend the information. The information was amended and the defendant asked for and was given twenty-four hours to plead to the amended information. The jury then impaneled was without objection on the part of the defendant discharged. Several days thereafter when the case came to trial on the amended information the accused filed a plea in bar claiming former jeopardy. The Court held the plea was properly overruled by the lower court on the ground that the accused had waived his rights in the matter and, at p. 205 of the opinion, said:

> "Where a Constitutional right is for the sole benefit of the accused, in the nature of a privilege, that right may be waived by express consent, or by implication from conduct indicative of consent, or by failure to claim or assert the right in seasonable time."

In *Palumbo* v. *Fuller Co.*, Conn., 122 Atl. 63, the employer appealed from an award for claimant.

One of the grounds assigned was the alleged unconstitutionailty of the Workmen's Compensation Act. The Court, at p. 65, said:

> "A ground of appeal that is fundamental is a claim that the Commissioner erred in not holding that Section 5345 is unconstitutional; as this question is independent of the finding it may be considered at the outset.
>
> ". . . . . .
>
> "The acceptance of Part B of the Act is voluntary on the part of an employer. When he so accepts the Act, he cannot thereafter urge that its provisions are ineffective in whole or in part because of any impairment of the constitutional rights of an employer. This reason of appeal cannot be sustained."

In the case of *Pierce* v. *Somerset Railway*, 171 U. S. 641, 43 L. Ed. 316, which involved a railroad mortgage and whether a State statute impaired the obligation of the contract, the Court, at p. 648, said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by failure to act, or by his action, is not a Federal one."

In the case of *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, the validity of insolvency proceedings had under a Massachusetts statute was involved. The Court said:

"The defendants in the trial court depended on a discharge obtained by them under regular proceedings, under the insolvency statutes of Massachusetts. This defense the plaintiffs met by alleging that the statutes, under which the defendants had procured their discharge, had been enacted after the promissory note sued on had been executed and delivered, and that, to give effect to a discharge obtained under such subsequent laws, would impair the obligation of a contract, within the meaning of the Constitution of the United States. Upon such a state of facts, it is plain that a Federal question, decisive of the case, was presented, and that if the judgment of the Supreme Judicial Court of Massachusetts adjudged that question adversely to the plaintiffs, it would be the duty of this Court to consider the soundness of such judgment.

"The record, however, further discloses that William T. Eustis, represented in this Court by his executors, had accepted and receipted for the money which had been awarded him, as his portion, under the insolvency proceedings, and that the Court below, conceding that his cause of action could not be taken from him, without his consent, by proceedings under statutes of insolvency passed subject to the vesting of his rights, held that the action of Eustis, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes, and that, accordingly, the defendants were entitled to the judgment."

The Supreme Court of the United States did not disturb the aforesaid ruling of the Massachusetts Court.

In the case of *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. Ed. 1229, the Court said:

> "There remains the contention that the statutes of Montana which we have epitomized, if enforced, will deprive the appellants of their property without due process of law because they provide that sale may be made of all the assets of the corporation when authorized by not less than two-thirds of the outstanding capital stock of the corporation, and that the plaintiffs must accept either the payment for their shares which this large majority of their associates think sufficient, or, if they prefer, the value in money of their stock, to be determined by three appraisers, or, still at the election of the appellants, by a court and jury.
>
> "This record does not call upon us to examine into this challenge of the validity of these statutory provisions, similar as they are to those of many other States and of a seemingly equitable character, for the reason that the appellants, by their action in instituting a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them."

In the case of *Pierce Oil Corporation* v. *Phoenix Refining Company*, 259 U. S. 125, 66 L. Ed. 855, which involved the making of a pipe line company a common carrier, the Court held:

> "The right of a foreign corporation to be secure against the imposition of conditions upon its right to do business which amount to a taking of its property without due process of law may be waived, or the right to claim it

> barred, by deliberate election, or by conduct inconsistent with the assertion of such right."

In the case of *William Shepard, et als.* v. *Barron*, 194 U. S. 553, 48 L. Ed. 1115, the constitutionality of an act regarding assessments against abutting property owners for improvements was assailed because the act provided that the assessments should be made on a front foot basis and not according to the special benefits derived.

The plaintiffs had by petition requested the work and impliedly agreed to pay for the same on the front foot assessment basis.

The Court held that they had waived any constitutional rights they might have, and at p. 566 of the opinion said:

> "It is, therefore, upon these facts, immaterial that the law under which the proceedings were conducted was unconstitutional, because the work was done at the special request of the owners, under the provisions of the act, and upon a contract, both implied and in substance expressed, that the bonds would be paid, and the assessment to be imposed for the raising of a fund to pay them would be legal and proper."

and at p. 568 said:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision. . . ."

One of the most sacred personal rights is that of trial by jury. The Seventh Amendment to the United States Constitution provides that in suits at common law the right of trial by jury should be preserved. The rules of civil procedure promulgated for the District Courts by the Supreme Court of the United States provide that the failure of a party to demand a jury as required by the Rules shall constitute a waiver by him of trial by jury (Rule 38). If one can waive his right to trial by jury by his mere inaction, surely the respondents can waive their rights in the Fourteenth Amendment, if any they have, by a contract in writing voluntarily executed by them.

The cases cited by respondents in the lower courts dealing with the question of waiver in matters of compensation relate to salaries the amount of which are definitely fixed and prescribed by law, the Courts holding in such cases that an acceptance of any less amount would be contrary to public policy and place the positions for said salaries in the category of barter and exchange. In the instant case the salaries are not fixed by law but are left as a matter of contract between the teachers and the School Board.

III.

Differentiation of the Maryland Cases From the Instant Case.

The Maryland Cases.

The two cases of *Mills* v. *Lowndes, et al.*, 26 Fed. Supp. 792, (D. C., Md. 1939), and *Mills* v. *Anne Arundel County Board of Education, et al.*, 30 Fed.

Supp. 245, (D. C., Md. 1939), were quoted from and cited with such frequency by respondents in the lower courts as being directly in point with the instant case that petitioners are prompted to deal with the same at some length and apply the facts and conclusions of those cases to the issues of constitutional rights and waiver as raised herein.

A. The Equal Protection Clause of the Fourteenth Amendment Has No. Application to the Instant Case.

The plaintiff, Mills, pursuant to Maryland school laws, was employed under a continuing contract which required an oath of office to be taken and subscribed. He further, after the expiration of a probationary period, became possessed of a right of property in his teaching position by virtue of tenure and could only be dismissed for stated cause, and after opportunity to be heard in his own defense. The respondent Alston, as are all other teachers in the public schools of Norfolk, on the other hand, is employed only on an annual basis and having no tenure of office, is possessed of no vested interest therein.

The case of *Mootz* v. *Belyea*, Supra, discusses fully the rights accruing to and the differences existing between a teacher with a fixed tenure of office and a teacher whose relationship of employment is purely contractual, how, if improperly dismissed, the former could proceed by mandamus for reinstatement but the latter would be relegated to an action for damages under the contract.

It is the contention of petitioners that respondents having no rights to employment (*Seattle High School, etc.* v. *Sharpless*, Supra) and having no vested interests

in their positions after employment, are therefore without rights to be protected by the equal protection clause of the Fourteenth Amendment. The plaintiff Mills, however, while not possessing any right to employment, subsequent thereto, did acquire a vested right in his position and consequently a fixed property right therein to protect.

District Judge Chestnut distinguishes between the plaintiff Mills as a public employee and as a teacher by occupation in holding that the action could be maintained for violation of constitutional rights, stating:

> "I conclude, therefore, that the plaintiff does have a status, not as a public employee, but as a teacher by occupation, which entitles him to raise the constitutional question."

Early in his opinion, however, he recognized the question as being one on which there is little available judicial authority and makes this pertinent observation:

> "In view of the fact that the amendment has been in force for 75 years, the absence of authority on the point is itself rather significant in the indication that it has not heretofore been thought the amendment applied to such a case."

It is submitted that the conclusion reached by Judge Chestnut is predicated upon the status of the plaintiff Mills and is only intended to embrace those teachers by occupation who possess a fixed tenure of office.

Correlated with the question of whether constitutional rights have been violated, is the factor of discretion in employment and salary fixing by the local board in the instant case. Judge Chesnut stresses the Maryland statutes prescribing minimum rates of pay and their application, stating:

> "Each County Board in cooperation with the County Commissioner as to the tax rate is free to determine the amount and quality of its educational facilities and has power to select its teachers and determine their compensation. *It may, in the exercise of its lawful discretion, decide whether to employ white or colored teachers for the colored schools; nor is it required to employ any particular teacher, whether white or colored, although duly qualified. And it may be observed that if the minimum salary schedules were written out of the law as unconstitutional, the local Boards will have unlimited discretion as to the amount to be paid the teachers.*" (Italics ours.)

It is also to be noted that an injunction was denied to the extent prayed for that colored teachers and principals shall not receive less salaries than white teachers and principals filling equivalent positions in the public schools.

The State of Virginia has no statute prescribing rates of pay, minimum or maximum, for teachers and principals in the public schools, but leaves the determination thereof entirely within the discretion of the local board to be incorporated in voluntary contracts.

B. The Respondents Have Waived Any Rights to the Relief for Which They Pray.

In the two *Mills cases* the contract of employment does not fix or designate the rate of pay but provides only that it shall not be less than the minimum salary provided by law. There is, therefore, no agreement as to salary and consequently no basis for waiver therein. In addition the plaintiff Mills was the principal of a colored elementary school, the minimum salary for which is not prescribed by the State of Maryland's minimum statutes.

In the instant case the actual rate of pay is fixed by agreement in the contract of employment.

Respectfully submitted,

R. M. Hughes, Jr.,
Alfred Anderson,
Jonathan W. Old, Jr.,
W. C. Coupland,
Counsel for Petitioners.